FILED

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Orangeburg Sausage Company, ... Respondent,

v.

Cincinnati Insurance Company
and R.L. Bryant & Son, ... Appellants.

Appeal from Orangeburg County
William P. Keesley, Circuit Court Judge

Opinion No. 2220
Heard October 4, 1993 - Filed September 6, 1994

AFFIRMED

William O. Sweeny, III, of Sweeny, Wingate, Murphy & Barrow; C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough; I.S. Leevy Johnson, of Johnson, Toal & Battiste; all of Columbia, for appellant Cincinnati Insurance Company; Paul A. Dominick and Jay S. Masty, both of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston, for appellant R.L. Bryant & Son.

Kenneth M. Suggs, of Suggs & Kelly, of Columbia,

for respondent.

HOWELL, C.J.: Orangeburg Sausage Company (OSCO) sued Cincinnati Insurance Company (Cincinnati) for breach of contract, negligence,[1] and bad faith failure to pay insurance benefits following a claim for damages to OSCO's business resulting from Hurricane Hugo. OSCO also sued the insurance agent, R.L. Bryant & Son, Inc. (Bryant), for negligence in connection with the policy and claim. A jury award OSCO $800,000 actual damages on the negligence claim against both defendants, $254,029.73 against Cincinnati on the breach of contract claim, and $250,000 against Cincinnati on the bad faith claim. The jury responded to a special interrogatory and found the

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[1]*See Sullivan Co., Inc. v. New Swirl, Inc.*, ___ S.C. ___, 437 S.E.2d 30 (1993) (an insurance agent or broker must exercise good faith, reasonable skill, care, and diligence; if, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal).

defendants acted recklessly, wilfully, wantonly, or in conscious disregard for OSCO's rights.

The trial court required OSCO to elect its remedy, and OSCO chose to recover under its negligence theory. By agreement the court then held a separate hearing on punitive damages. The jury returned a verdict for OSCO for $1,630,000 in punitive damages.

Cincinnati and Bryant moved for judgment notwithstanding the verdict, new trial absolute, or alternatively new trial *nisi remittitur*. In a thorough and detailed order, the trial court granted the new trial *nisi remittitur* motion, reducing the actual damages verdict to $595,216.00. The trial court denied all other motions, and Cincinnati and Bryant appeal. We affirm.

OSCO is a corporation engaged in the wholesale and retail sale of food products. OSCO's business complex surrounds the end of a dead end street. The office, slaughtering facilities and a

retail market are on one side of the street. The freezer building is on the opposite side. Evidence showed that the entire business location has always been known as 597 High Street.

Cincinnati provided insurance on the contents of OSCO's freezers. Cincinnati wrote an initial policy covering the frozen foods products beginning July 1, 1983 and ending July 1, 1988. This policy listed "597 High Street" as the location of the insured premises. OSCO had requested coverage of $200,000.00 for the frozen food products alone, though Cincinnati wrote the policy to cover all contents.

In October 1986, three years into the initial policy, OSCO pledged its real estate and equipment located on High Street as collateral for a loan. The loan required that the collateral be covered by casualty insurance, so OSCO asked Bryant to add the necessary coverage. Bryant sent a memo to Cincinnati requesting an endorsement for the additional coverage. There was no

evidence that an OSCO representative had ever seen this document before this lawsuit. This memo, for the first time, uses the erroneous "488 High Street" as a premises address, in addition to a reference to "597." Cincinnati issued an insurance binder adding coverage of $75,000.00 for each building and $30,000.00 for the "contents - equipment" located in each.[2] The binder describes one building as 597 High Street and the other as "across street from 597." The evidence was undisputed that there is no "488 High Street" and that the freezer building would not have that designation if assigned one by the Post Office. The trial court noted that the only credible evidence was that 488 first appeared on a form which the agent prepared, without the insured's signature or review.

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[2]In evaluating this request for additional coverage, the frozen food products in the freezer building were the only contents which OSCO had previously sought to insure and those products had been insured for the preceding three years at an address of 597 High Street.

About two years later, when the initial policy expired in 1988, Cincinnati issued a one-year policy. OSCO's witnesses classified this as a renewal. OSCO sought no changes in coverage between the 1986 loan and September 1989. The application for the renewal policy used both the 597 High Street and 488 High Street addresses, but was not signed by OSCO's representatives despite a blank for its signature.

OSCO's representatives said they did not read this policy, though Bryant's witness testified that a representative of Bryant delivered it and went over it with OSCO's vice president when it was received. Two experts testified that people generally do not read their insurance contracts and, if they do read them, they do not generally understand them. The insurance company drew this contract and chose its language.

The third page inside the cover of the 1988 policy is entitled "Common Policy Declarations." OSCO is the insured and

the address is "597 High Street." The eighth page of the policy is entitled "Commercial Property Coverage Part Declarations" and is the only page which refers to a "488 High Street" address. On that page, item numbers are separately stated for the locations and the coverage, but there is no explanation of the significance of the numbering system. The record contains a "Dealers Comprehensive Form," along with the evidence that Cincinnati considered it included in the 1988 contract. This document can be read as providing coverage for products of the insured on the property located *anywhere*, provided that the property was owned, leased, or regularly used by the insured in its business.

In September 1989, Hurricane Hugo damaged OSCO's property. An off-premises power outage cut OSCO's electricity, and wind damaged OSCO's plant, allowing rainwater to contaminate the frozen food products stored in separate units of the freezer building. Cincinnati adjusted the loss at more than

$250,000.00, but disputed OSCO's claim for insurance benefits. After a delay of eight months, Cincinnati paid only slightly over $36,000.00, asserting first that OSCO had changed its position on the cause of loss after learning that the initial claim (off-premises power outage) was not covered, and second, that the largest amount of contents coverage was not the freezer building.

When the claim was not paid, OSCO promptly hired an attorney. On November 14, 1989, the attorney forwarded to Cincinnati an itemization of losses totalling $231,505.12, including $198,260.13 for contaminated frozen food in the main freezer. The attorney also made a demand for the undisputed portions of the coverage.

Several Cincinnati adjusters were involved in the claim. OSCO provided affidavits and other materials, and Jim Guth, a Cincinnati adjuster, reviewed the claim and inspected the property. Guth's report indicated Cincinnati determined OSCO's claim to be

valid and covered. Guth raised the reserves on the contents as of December 5, 1989, to $210,000.00 Dollars. On December 8, 1989, OSCO sent Guth information, along with another demand for prompt payment of the undisputed amounts. Shortly thereafter, Guth's involvement with the file was ended and yet another adjuster, Hendrickson, became involved.

OSCO supplied (or resupplied) more information on January 17, 1990. Despite Guth's findings and actions in raising the reserves, Cincinnati informed OSCO that the contents coverage for the freezer building was limited to $30,000.00. On February 20, 1990, five months and four adjusters after the hurricane, Cincinnati sent OSCO an itemization of what it would pay, reflecting the lower coverage level and imposing a coinsurance penalty.

Cincinnati claimed the only plausible reading of the 1988 policy is that the freezer building is 488 (even though the evidence

shows that Cincinnati insured it as 597 for the preceding five years) and that the contents there are insured for only $30,000.00, while the building on the opposite side of the street had $230,000.00 coverage for contents (even though there was competent evidence that the risk of loss was far greater for the freezer building). Cincinnati asserted that if OSCO's representatives had only looked at the 1988 policy, they would clearly have seen that the coverages were switched from what they should have been.

On March 6, 1990, OSCO's attorney requested, for at least the *fifth* time, that Cincinnati pay the undisputed portions of the claim. Five and one-half months after the hurricane, the request for payment of the undisputed amounts was sent to the home office and, about two weeks thereafter, the adjuster was instructed to pay the undisputed portions of the claim and to set up a meeting to try to resolve the disputed portions. Two more months passed. When

the meeting was held in May 1990, Cincinnati tendered payment for the undisputed portion of the claim conditioned upon OSCO's signing a receipt referring to losses at 597 *and 488* High Street. The non-existence of 488, however, was in dispute. Upon OSCO's refusal to sign, Cincinnati withdrew payment of the check for $41,319.93. On May 23, 1990, Cincinnati deducted approximately $5,000.00 for some reason and sent OSCO a check for $36,006.89 for the undisputed amount. Thus, eight months passed between the hurricane loss and Cincinnati's payment of $36,006.89 towards a loss which Cincinnati adjusted at $254,029.23. In fact, on February 2, 1990, Cincinnati had offered to pay a total of $75,675.51. Two years passed before the case went to trial.

I.

Cincinnati and Bryant argue the trial court erred in failing to grant its directed verdict motion on the ground that OSCO was

contributorily negligent as a matter of law for failing to read its policy. Cincinnati and Bryant argue OSCO's principals' failure to read the policy precludes them from complaining about the coverage provided by the policy, under *Doub v. Weathersby-Breeland Insurance Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977). We disagree.

In *Doub*, the plaintiff sought coverage for damage to his roof caused by a snow and ice storm. Damage caused by snow or ice was specifically excluded from coverage under the policy. The plaintiff conceded the exclusion in the case was valid and brought an action for fraud and misrepresentation against the insurer. The plaintiff admitted that he never read the policy, but stated that if he had he would not have understood the scope of the exclusion. The insurer moved for a directed verdict on two grounds: (1) plaintiff had no right to rely on oral misrepresentation as to the coverage when the written terms were in his possession and

available to him; and (2) there was no evidence of a detrimental change of position in reliance on those misrepresentations. The Supreme Court noted:

> [O]ne cannot complain of fraud in the misrepresentation of contents of a written instrument in his possession when the truth could have been ascertained by his reading the instrument. One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning.

233 S.E.2d at 114. The court noted further:

> * * *Here, plaintiff had eighteen months to inform himself as to the terms, conditions and exclusions in the written contract to which he was a party. He made no effort to do so, and never read the contract. The facts here are entirely different and distinguishable from those in *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969), where the insured had read the policy contract, had not understood the coverage on certain items, including the elevator, and had specifically asked if the operation of the elevator was covered, to which the defendant agent, an experienced insurance agent, had replied that it was. Here, plaintiff never read his policy and made no inquiries as to any of its specific terms and provisions, and continued to ignore the written

instrument for eighteen months.

Id. *Doub*, however, does not compel a finding of contributory negligence in the case at bar. In *Doub*, the conduct of the plaintiff was clearly a proximate cause of his injury. The policy explicitly and unambiguously excluded coverage for damage caused by snow and ice. Had the plaintiff read his policy, he would have immediately recognized the gap in his coverage, and could have purchased additional insurance.[3] Here, there was ample evidence that OSCO's employees might not have learned and understood the relevant terms and provisions of the policy by simply reading it. The policies provided by Cincinnati were inconsistent and confusing. In fact, Cincinnati's own adjuster gave the policy the same interpretation as that asserted by OSCO at trial. The

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[3]The court found the exclusion in *Doub* to be unambiguous, and not difficult to understand. The court therefore described plaintiff's assertion that he would not have understood the exclusion as "hardly credible." 114 S.E.2d at 113.

contents of the freezer building were originally insured for $200,000 under a policy covering property located at 597 High Street. The 1988 policy provided $230,000 of coverage for the contents of a building located at 597 High Street. While the 1988 policy also used the 488 High Street address, it did not describe the building at this address as the freezer building. Thus, even if OSCO had read the policy, it would not have been put on notice that the policy did not provide the coverage it had requested. Therefore, even if OSCO were contributorily negligent, there is no evidence that this negligence was a proximate cause of the loss. *See, e.g., Edwards v. Bloom*, 246 S.C. 346, 143 S.E.2d 614 (1965) (to bar recovery, negligence of injured party must have contributed as a proximate cause of the injury); *accord Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992), *cert. denied* (1993).

Moreover, OSCO relied upon the agent whom they trusted

to provide them with the same coverage they enjoyed for the previous five years under the policy. *See Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 423-24, 171 S.E.2d 486, 492 (1969)("[w]hile an insured cannot abandon all care, the rules which require one to inform himself of the terms of his contract and to take precautions for his own protection are less exacting when dealing with one's own insurance agent or broker in the procurement of an insurance contract.") After the 1983 policy was put in place, OSCO requested additional coverage, but never requested that the coverage level on the freezer building be reduced. OSCO was entitled to rely on Bryant to properly renew the insurance policy. A review of the policy by a layman would not have revealed the coverage problem.

Questions of contributory negligence and recklessness are ordinarily for the jury and only rarely become questions of law for the court. *See Tucker v. Albert Rice Furniture Sales, Inc.*, 295

S.C. 119, 367 S.E.2d 427 (Ct. App. 1988) (where there is any uncertainty as to the existence of contributory negligence, the question of whether a plaintiff is guilty of contributory negligence which will bar recovery is for the jury to determine). The question of contributory negligence becomes a question of law for the courts only when the evidence is susceptible of but a single reasonable inference. *Id.* Further, even if undisputed facts show that both parties may be guilty of negligence, "questions of negligence, proximate cause, and contributory negligence should be submitted to the jury if there is a fair difference of opinion as to whose act or acts produced or contributed to the injury complained of as a direct and proximate cause." *Republic Textile Equip. Co. of S.C. v. Aetna Ins Co.*, 293 S.C. 381, 388, 360 S.E.2d 540, 544 (Ct. App. 1987). In determining whether a plaintiff is contributorily negligent as a matter of law, the evidence of the whole case must be viewed in the light most favorable to the

party opposing the motion for directed verdict. *Tucker*, 367 S.E.2d at 429. Viewing the evidence in the light most favorable to OSCO, we conclude the trial court properly submitted the issue of contributory negligence to the jury.

Furthermore, the trial court held that even if the court could hold OSCO contributorily negligent as a matter of law in failing to read the insurance policy, the jury affirmatively found, with ample supporting evidence, that the defendants were wilful, wanton and reckless. We agree. Contributory negligence is not a defense to reckless and wilful conduct. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). Although Cincinnati argues the issue of contributorily [sic] recklessness in its brief on appeal, the trial court refused to address it because the court held Cincinnati did not raise the issue at trial. In fact, the trial court charged the jury "[i]f you find that the defendant was reckless, willful, or wanton and that the plaintiff

was merely negligent, then your verdict must be for the plaintiff unless the defendant proves the next step, and that is that the plaintiff was contributorily reckless, willful, or wanton." Hence, the court submitted the issue of OSCO's contributory recklessness to the jury, which found in OSCO's favor.

II.

Cincinnati argues the trial court erred in failing to grant its motion for directed verdict as to punitive damages. We disagree.

The trial court conducted a separate hearing on the issue of punitive damages. OSCO called an expert witness who testified about Cincinnati's net worth, its reserves, and its earnings. Cincinnati offered no witnesses and asked only one question on cross examination. The entire punitive damages hearing lasted only minutes, though the trial court in no way restricted the parties. The parties also agreed that they would not make closing arguments in this stage of the trial, again not at the trial court's

insistence. After deliberations, the jury found OSCO showed by clear and convincing evidence its entitlement to an award of punitive damages. The jury awarded $1,630,000.00 in punitive damages, which was roughly twice the actual damages award, and 0.003 percent of Cincinnati's net worth.

The trial court conducted a post-trial review pursuant to *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), and made findings on the record. The trial court also considered additional materials which were supplied by Cincinnati. Cincinnati filed various motions to vacate the award of punitive damages, for a new trial, and for post-verdict review of the punitive damage award. The trial court reviewed these motions in light of the requirements of *Gamble* and *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and reaffirmed its previous determination that the award of punitive damages in this instance was proper.

The trial court noted the United States Supreme Court and Supreme Court of South Carolina have found that punitive damages do not violate the Due Process clause, so long as the system for their imposition is accompanied by sufficient safeguards. The trial court also noted that South Carolina's commitment to the imposition of punitive damages in appropriate circumstances has been reaffirmed as a matter of public policy. The court found the record contained clear and convincing evidence that Cincinnati engaged in a wide variety of misconduct in issuing the policy and adjusting the claim justifying the award of punitive damages in the amount determined by the jury. The court held there was clear and convincing evidence that Cincinnati acted recklessly or in a conscious disregard of OSCO's rights by: disregarding substantial evidence that OSCO's loss was from water damage, rather than an off-premises power outage; refusing to pay, without explanation, even the undisputed portions of OSCO's

claims for eight months, despite repeated requests for payment; violating portions of its own claims manual; demanding documentation on a piecemeal basis for months after the loss; taking five months to advance the position that the freezer building had only $30,000 in contents coverage and did so *after* one of its adjusters determined that the loss was owed and increased the reserves; refusing to consider OSCO's very viable position on the issue of the incorrect address and Cincinnati's responsibilities, despite having insured OSCO's freezer building at a listed address of 597 High Street for the preceding five years; and requiring, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address.

The trial court also found there was clear and convincing evidence that Cincinnati was fully aware of the conduct of its agents, as one of its officers testified that he personally supervised the claim. The court found the punitive damages award was well

within proportions to the original actual award and the amount to which the court reduced the actual award, noting that the award in *Haslip* was more than 200 times the plaintiff's out of pocket expenses. The court found the award easily within Cincinnati's ability to pay as it is only three/one-thousandths of Cincinnati's net worth. The court also found the deterrent effect of the punitive award obvious, as the amount is substantial, designed to get the attention of Cincinnati without being excessive, and appropriate to effect the implementation of remedial action. The trial court noted in Cincinnati's written argument in support of its motion to vacate, Cincinnati stated it fired its agent, added new policy language, and took other, unspecified remedial steps, which demonstrates the punitive award achieved its purpose. Accordingly, the trial court confirmed the award.

After carefully reviewing the record, we agree with the trial court's analysis. A punitive damages award survives constitutional

scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Kinard v. Crosby*, ___ S.C. ___, 433 S.E.2d 835, 839 (1993). The trial court's charge in this case explained the nature, purpose and basis for the award, in compliance with *Gamble*. Further, the court reviewed both the actual and punitive damages awards and found them to be within reasonable limits. *See Weir v. Citicorp Nat. Serv., Inc.*, ___ S.C. ___, 435 S.E.2d 864 (1993)(under *Gamble v. Stevenson*, the trial judge **may** consider enumerated factors, but is not required to make findings of fact for **each** factor; after carefully reviewing the record, the Supreme Court found no error in the trial judge's review of the punitive damages award). Accordingly, we affirm the punitive damage award. *Kinard*, 433 S.E.2d at 839.

Cincinnati also complains that the trial court should not have included in the charge on punitive damages those factors cited in *Gamble* which appeared to be factually applicable to this case. Those factors, according to Cincinnati, are only for a post-trial evaluation by the court. The trial court held that while *Gamble* did list the factors in the context of review of the jury's award by the trial court, there appears to be no logical reason to assert they should not be considered by the jury. The court noted the Fourth Circuit Court of Appeals has held that federal trial courts must submit the *Gamble* factors to the jury, finding that the standards adopted by the South Carolina Supreme Court in *Gamble* are intended to be the basis for all awards of punitive damages in South Carolina. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991). We find no error in the trial court's instruction and hold that it complies with the requirement in *Kinard* that the trial court explain the nature, purpose and basis for

the award to the jury.

Cincinnati also contends that the trial court should have declared a mistrial during the punitive damages phase, arguing that OSCO made improper arguments regarding the unusual length of the trial and that the testimony concerning Cincinnati's daily earnings was prejudicial and improperly suggested a formula for determining the amount of punitive damages. The court stated that Cincinnati raised only the question of an improper formula at trial, and accordingly only addressed that issue.

Dr. Oliver Wood, Osco's [sic] financial expert, testified that Cincinnati's daily earnings were approximately $290,000.00 per day and that it had therefore earned $2.9 million during the ten days of trial. The trial court found this testimony clearly relevant on the issue of Cincinnati's ability to pay an award. *See Mattison v. Dallas Carrier Corp.* and *Gamble v. Stevenson*. Further, the trial court perceived no prejudice from the daily earnings

testimony as the award of punitive damages was far less than $2.9 million. We find no abuse of discretion.[4]

III.

Cincinnati argues the trial court erred in failing to grant its motion for a new trial based upon the inconsistency of the jury's verdicts, since the jury returned widely varying amounts under the separate causes of action. We disagree.

It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967); *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984), overruled in part other grounds, *O'Neal v. Bowles*, ___ S.C. ___, 431 S.E.2d 555 (1993). *See also New*

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[4]We note the second part of the bifurcated hearing lasted only a few minutes. OSCO's counsel presented only one witness, Dr. Wood, and asked him thirteen questions. Cincinnati's counsel asked the witness only one question on cross examination, and presented nothing in reply.

York Carpet World v. Houston, 292 S.C. 101, 354 S.E.2d 924 (Ct. App. 1987)(a jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention; it is the Court of Appeals' duty to uphold jury verdicts if they can be logically reconciled).

In this case, the jury found for OSCO on its negligence, breach of contract, and bad faith claims. Although the jury awarded different amounts under each theory, this does not mean the verdicts are inconsistent. Different damages are recoverable under each claim, and the trial court instructed the jury as to the appropriate measure of damages under each claim. In fact, in response to counsel's argument regarding exceptions to the charge, the court brought the jury back and specifically instructed the jury regarding the different measures of damage under each of OSCO's claims. We find no error.

IV.

Cincinnati argues the trial court erred in failing to grant its motion for a new trial as to actual damages, claiming the awards were unduly liberal, excessive, and motivated by passion, caprice and prejudice. We disagree.

Dr. Wood, an expert on evaluating business losses, testified that OSCO had suffered a loss of $595,216.00 up to the time of trial, due to a combination of unpaid property loss claims and loss of profit due to inability to sell, replace, and re-sell inventory. Tim Lee, OSCO's president, testified without elaboration that his business had suffered a loss of $750,000.00.

The trial court noted that while the jury could, and obviously did, believe Lee's testimony regarding damages, there was little, if anything, to substantiate the amount. The court determined that the actual damage award should be reduced to the amount established by Dr. Wood's expert opinion. The trial court

specifically held this did not mean the verdict was the result of caprice, passion or prejudice, nor that it should be set aside entirely. *See, e.g., Hall v. Palmetto Enter. II, Inc.*, 282 S.C. 87, 317 S.E.2d 140 (Ct. App. 1984).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is "merely excessive," although not motivated by considerations such as passion, caprice or prejudice. *O'Neal v. Bowles*, ___ S.C. ___, 431 S.E.2d 555 (1993). The grant or denial of this motion is within the trial court's discretion and its decision will not be reversed on appeal absent an abuse of discretion. *Id.* We have reviewed the record and do not find an abuse of discretion. Further, we do not find the amount of the verdict grossly excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, so to require a new trial absolute. *Id.*

Cincinnati also alleged the jury was motivated by improper argument on the part of OSCO's counsel. The trial court noted it recalled no impropriety which would taint the trial, and that Cincinnati made no objection at trial. We agree with the trial court that Cincinnati accordingly waived any right to question the propriety of the argument. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983).

V.

Cincinnati argues the trial court erred in permitting expert testimony regarding the propensities of insureds to fail to read their policies, claiming the testimony contradicted the law of South Carolina that "failure to read a policy is contributory negligence/recklessness as a matter of law." Cincinnati claims an expert may not give an opinion on questions of law, nor can an expert instruct the court with respect to the law applicable to the case.

In its post-trial order, the trial court noted that the expert, Mike Barranco, commented briefly that most insureds do not read their insurance policies. The court also noted that Cincinnati contended this testimony was unduly prejudicial and "contradicted the clear law of South Carolina." The trial court held in the context in which it was given, Cincinnati suffered no prejudice from this remark, and its admission was not an abuse of discretion. The court also held the testimony was appropriate, citing *Shields v. South Carolina Dept. of Highways and Pub. Transp.*, 303 S.C. 439, 401 S.E.2d 185 (Ct. App. 1991), *cert. denied* (trial court admitted expert testimony that the Department's actions "bordered on criminal negligence"; the Court of Appeals disagreed that the expert commented "on what the law is" but actually only gave his opinion on an issue of fact in the case).

We have reviewed the record and arguments of counsel and find no abuse of discretion. *See Hofer v. St. Clair*, 298 S.C. 503,

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381 S.E.2d 736 (1989) (the admission or exclusion of evidence is within the trial court's discretion).

VI.

Cincinnati argues the trial court improperly permitted attorney Ladson Beach to testify. Cincinnati claims that Beach was named as a witness in an untimely fashion, that Cincinnati was deprived of its right to fully depose Beach, and that Beach's testimony violated Rule 3.7 of the Rules of Professional Conduct (found in Rule 407, SCACR) in that his roles as advocate and witness unduly prejudiced Cincinnati.

Beach was the attorney OSCO initially hired when problems arose in its claim. The trial court found Beach "clearly played an integral and well-known part in the process which gave rise to this lawsuit." Cincinnati raised the issue concerning Beach's possible testimony at the outset of the trial and the trial court reviewed the matter overnight. The court determined that

Beach was entitled to be present as he was OSCO's attorney, but that the ethics rules prohibited an attorney-witness from continuing as an "advocate" in the trial. OSCO's counsel told the court and opposing counsel at the outset that Beach might be called, but only in rebuttal, for the purpose of contradicting words and actions attributed to him by an agent of Cincinnati. OSCO listed Beach as a potential witness the week before trial and his deposition was begun, though not completed. When the issue regarding Beach's testimony arose, the trial court offered Cincinnati the opportunity to request a continuance. Counsel declined to do so. The trial court held the Rules of Civil Procedure do not establish a cutoff for naming of witnesses and found nothing improper in allowing Beach to testify in reply. *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984).

The trial court added that under Rule 3.7 of the Rules of Professional Conduct, even if Beach acted as an advocate during

the trial, subsection (3) allowed testimony where "[d]isqualification of the lawyer would work a substantial hardship on the client." The trial court found that disqualification of Beach would have deprived OSCO of the only available witness to rebut the adjuster's testimony, which would be a substantial hardship to OSCO. The court determined it properly admitted Beach's testimony and there was no surprise to Cincinnati.

We have reviewed the record and arguments on appeal and find no abuse of discretion in the trial court's ruling.

VII.

Cincinnati argues the trial court erred in failing to instruct the jury that it could consider alleged recklessness, willfulness and wantonness of Cincinnati only as it related to alleged negligent procurement conduct by Bryant when determining punitive damages. It appears, however, that this issue was not properly preserved for appeal. Cincinnati raised the issue with the trial

court before the jury was charged on punitive damages. After much discussion, the trial court took the issue under advisement without making a ruling. The jury charge given did not exclude the bad faith evidence from the jury's consideration. While Cincinnati raised many other objections after the charge was given, it did not raise this particular objection again. Cincinnati's failure to request a ruling by the court and its failure to raise this particular objection to the punitive damages charge after the charge was given leaves the issue unpreserved for review. *See, e.g., Haskins*, 283 S.C. at 238, 321 S.E.2d at 191 (where trial judge does not make ruling and counsel does not pursue ruling, issue is not preserved for appeal); *Gruber*, 309 S.C. at 21, 419 S.E.2d at 795 (failure to object to improper jury instruction leaves issue unpreserved for appeal).

However, even if the issue were preserved, we find no error. Cincinnati contends that, because OSCO elected to recover

under its negligence cause of action, the jury should have considered only the evidence supporting the negligence claim during the punitive damages phase of the trial. We disagree.

Election of remedies is required to prevent double recovery for a single wrong. *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990). OSCO suffered a single wrong and asserted several theories under which Cincinnati could be held liable. OSCO, of course, could not recover for both negligence and breach of contract and therefore elected to recover only on its tort claim. The jury specifically found Cincinnati acted willfully or recklessly in connection with OSCO's negligence claim and its bad faith claim. Punitive damages were thus appropriate under the negligence cause of action as well as the bad faith cause of action. OSCO therefore did not receive damages to which it was not entitled, nor did the punitive damages amount to a double recovery.

As part of its award of actual damages under its negligence claim, OSCO received the profits it lost as a result of Cincinnati's failure to timely process OSCO's claim, which delay prevented OSCO from replacing and reselling the damaged inventory. Cincinnati never challenged the propriety of the award of lost profits under OSCO's negligent procurement claim. Just as Cincinnati's handling of the claim was relevant to OSCO's actual damages under its negligent procurement claim,[5] it was also relevant to the award of punitive damages under the claim. The jury was therefore entitled to consider Cincinnati's conduct while processing OSCO's claim when assessing punitive damages. We have thoroughly reviewed the record and find no error in the instructions to the jury during the punitive damages phase of the trial.

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[5]*See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (actual damages may include damages from an insurer's unreasonable action in processing a claim).

VIII.

In summary, we conclude the trial court's order thoroughly and correctly disposed of the issues Cincinnati and Bryant raised in their post-trial motions. As a final comment, we observe that "[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276, 279, 395 S.E.2d 187, 189 (Ct. App. 1990), *cert. denied*. This notion was cogently expressed by the Supreme Court of South Carolina in *Smoak v. Seaboard Coast Line Railroad Co.*, 259 S.C. 632, 193 S.E.2d 594 (1972), in which the Court stated:

> The defendant is not entitled to a perfect trial, but only a fair trial. Hardly any case is completed without some flaw. If a new trial was required every time a flaw or mere possibility or prejudice occurred, litigation would be unduly prolonged. Our Court has held many times that such matters are basically for the sound discretion of the trial judge.

Id. 259 S.C. at 640, 193 S.E.2d at 598. Likewise, from our

thorough review of the voluminous record before the Court, we find that, although the trial may not have been perfect, Cincinnati and Bryant received a fair trial. We commend the trial judge for his skill and patience in handling such a long and complex trial.

Accordingly, the judgment is

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

May 9, 1995

William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire
Sandra S. Reid, Esquire
Sweeny, Wingate, Murphy & Barrow, P.A.
P. O. Box 12129
Columbia, S. C. 29211

I. S. Leevy Johnson, Esquire
Johnson, Toal & Battiste
P. O. Box 1431
Columbia, S. C. 29202

Re: Orangeburg Sausage Company v. Cincinnati Insurance Company, et al.

Dear Ms. Reid and Gentlemen:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/Ernest A. Finney, Jr. C.J.
For the Court

Associate Justice Jean H. Toal, not participating

May 9, 1995."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

DEPUTY CLERK

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS COUNTY OF ORANGEBURG	)
ORANGEBURG SAUSAGE COMPANY, Plaintiff, -vs- CINCINNATI INSURANCE COMPANY and R.L. BRYANT AND SON, INC., Defendants.	)))))ORDER REGARDING)POST-TRIAL)MOTIONS)Case # 90-CP-38-480))))

Plaintiff (OSCO) sued Cincinnati Insurance Company (Cincinnati) for breach of contract, negligence, and bad faith failure to pay insurance benefits. OSCO also sued R. F. [sic] Bryant & Son, Inc. (Bryant), the agent, for negligence in connection with the policy and claim. Following a jury trial, OSCO was awarded $800,000 actual damages on the negligence claim against both defendants. OSCO was also awarded $254,029.73 on the breach of contract claim, and $250,000.00 on the bad faith claim. The Court then required OSCO to elect and

recovery under negligence was chosen.

In response to a special interrogatory, the jury found that the defendants acted recklessly, wilfully, wantonly, or in conscious disregard for the rights of the plaintiff. By agreement of all parties, a separate punitive damages hearing was then held, resulting in an award of $1,630,000.00.

Bryant has moved for judgment notwithstanding the verdict, citing that OSCO was contributorily negligent or reckless.

Cincinnati has moved for judgment notwithstanding the verdict, a new trial, a new trial nisi remittitur, for post-trial review of punitive damages, and to vacate the punitive damage award. Cincinnati has advanced fifty grounds in support of its motions.

The motion for new trial nisi remittitur as to actual damages is granted, and Defendants shall be entitled to new trial unless OSCO remits so much of the actual damages award as will result in judgment for actual damages in that amount of $595,216.00. All other motions are denied.

BACKGROUND:

Hurricane Hugo struck the property of OSCO, a corporation engaged in the wholesale and retail sale of food products. The primary loss involved rainwater contamination to frozen foods which were stored in separate units of "the freezer building." Cincinnati adjusted the loss to be more that $250,000.00, but disputed OSCO's claim for insurance benefits. After a delay of eight months, it paid slightly over $36,000.00, asserting two primary positions. First, Cincinnati felt that OSCO had changed its position on the cause of loss after learning that the initial claim (off-premises power outage) was not covered. Second, Cincinnati said that the lion's share of contents coverage was not on the freezer building. It maintained that the building across the street had $230,000.00 in coverage. The freezer building had only $30,000.00.

OSCO's business complex surrounds the end of a dead end street. The office, slaughtering facilities, and a retail market are

on one side of the street. The freezer building is on the opposite side. Evidence showed that the entire business location has always been known as 597 High Street.

The defendants provided OSCO insurance on the contents of the freezers. An initial policy was written to cover the frozen food products beginning July 1, 1983 and ending July 1, 1988. This policy listed 597 High Street as the location. OSCO had requested coverage of $200,000.00 for the frozen food products alone, though the policy was written to cover all contents.

Three (3) years into the initial policy (in October, 1986), OSCO pledged as collateral for a loan its business real estate and equipment located on High Street. The loan required that the collateral be covered by casualty insurance, so OSCO asked Bryant to add the necessary coverage. An insurance binder was issued adding $75,000.00 for each building and $30,000.00 for the "contents - equipment" located in each. (It is important to remember, in evaluating this request for additional coverage, that

the frozen food products in the freezer building were the only contents which OSCO had previously sought to insure and that they had been insured for the preceding three years at an address of 597 High Street.) The binder describes one building as 597 High Street and the other as "across street from 597."

An application for additional coverage was drafted by Bryant, but not signed by OSCO despite a blank for OSCO's signature. There is no evidence that an OSCO representative had ever seen this document before this lawsuit. This application, for the first time, uses the erroneous 488 High Street as a premises address, in additional to a reference to 597. The evidence is undisputed that there is no 488 and that the freezer building would not have that designation if assigned one by the Post Office. The only credible evidence is that 488 first appeared on a form which the agent prepared, without the insured's signature or review.

About two years later, when the initial policy expired in 1988, a one-year policy was issued by Cincinnati. OSCO's

witnesses classified this as a renewal. OSCO sought no changes in coverage between the 1986 loan and the hurricane.

The representatives of OSCO said they did not read this policy, though Bryant's witness testified that a representative of Bryant delivered it and went over it with OSCO's vice president when it was received. Two experts testified that people generally do not read their insurance contracts and, if they do read them, they do not generally understand them. The insurance company drew this contract and chose the language to include in it.

When the 1988 policy is examined, the third page inside the cover of the policy is entitled "Common Policy Declarations." OSCO is the insured and the address is 597. The eighth page of the policy is entitled "Commercial Property Coverage Part Declarations" and is the only page which refers to a 488 address. On that page, item numbers are separately stated for the locations and the coverages, but there is no explanation for the significance of the numbering system.

The defendants say that the only plausible reading of the 1988 policy is that the freezer building is 488 (even though the evidence shows that the defendants insured it as 597 for the preceding five years) and that the contents there are insured for only $30,000.00, while the building on the opposite side of the street had $230,000.00 coverage for contents (even though there was competent evidence that the risk of loss was far greater for the freezer building). The defendants assert that, if OSCO had only looked at the 1988 policy, it would clearly have seen that the coverages were switched from what they should be.

The record contains a "Dealers Comprehensive Form," along with evidence that Cincinnati considered that it was included in the 1988 contract. This document can be read as providing coverage for products of the insured located anywhere that was owned, leased, or regularly used by the insured in its business.

When the hurricane hit, an off-premises power outage cut OSCO's electricity. Wind damaged OSCO's plant, allowing

rainwater to contaminate the frozen food products. OSCO sought payment from Cincinnati and, when the claim was not paid, promptly hired an attorney. The attorney forwarded to Cincinnati an itemization of losses totalling $231,505.12 in a letter of November 14, 1989, including $198,260.13 for contaminated frozen food in the main freezer. A demand for the undisputed portions of the coverage was also made.

Several adjusters for Cincinnati were involved in the claim. Affidavits and other materials were provided by OSCO, then Mr. Jim Guth, a Cincinnati adjuster, reviewed the claim and inspected the property. His report is in evidence (plaintiff's exhibit 20) and may certainly be read to indicate that Cincinnati determined OSCO's claim to be valid and covered. Mr. Guth raised the reserves on the contents as of December 5, 1989, to $210,000.00 Dollars. On December 8, 1989, OSCO sent Mr. Guth information, along with another demand for prompt payment of the undisputed amounts. Shortly thereafter, Mr. Guth's involvement

with the file was ended and yet another adjuster became involved, Mr. Hendrickson.

More information was supplied (perhaps resupplied) by OSCO on January 17, 1990. Despite the previous adjuster's findings and actions in raising the reserves, Cincinnati then informed OSCO that the contents coverage for the freezer building was limited to $30,000.00. Five months and four adjusters after the hurricane, on February 20, 1990, Cincinnati sent to OSCO an itemization of what it would pay which reflected the lower coverage level and imposed a coinsurance penalty.

On March 6, 1990, OSCO's attorney requested, for at least the fifth time, that the undisputed portions of the claim be paid. Five and one-half months after the hurricane, the request for payment of the undisputed amounts was sent to the home office and, about two weeks thereafter, the adjuster was instructed: (1) to pay the undisputed portions of the claim; and, (2) to set up a meeting to try to resolve the disputed portions. Two more months

passed. When the meeting was held in May, 1990, the payment tendered for the undisputed portion of the claim was conditioned upon OSCO's signing a receipt referring to losses at 597 and 488 High Street. The non-existence of 488 was a matter in dispute. Upon OSCO's refusal to sign, payment of the check for $41,319.83 was withdrawn. On May 23, 1990, approximately $5,000.00 was deducted for some reason and a check for $36,006.89 was sent for the undisputed amount by Cincinnati. The balance of the claim became the subject of this lawsuit and no further payments have been made since.

Thus, eight months passed between the hurricane loss and the payment of $36,006.89 towards a loss which Cincinnati adjusted at $254,029.23. No further sums were paid. On February 2, 1990, Cincinnati offered to pay a total of $75,675.51. Two years passed before the case came for trial.

ACTUAL DAMAGES.

Testimony regarding actual damages came from two

sources: Tim Lee, president of OSCO, and Dr. Oliver Wood, an expert on evaluating business losses.

Dr. Wood testified that OSCO had suffered a loss of $595,216.00 up to the time of trial, due to a combination of unpaid property loss claims and loss of profit due to inability to sell, replace, and re-sell inventory. Lee's testimony, which was without elaboration, was that his business had suffered a loss of $750,000.00.

While the jury could, and obviously did, believe Lee's testimony regarding damages, there was little, if anything, to substantiate the amount and the Court is of the opinion that the actual damage award should be reduced to that established by Dr. Wood's expert opinion. That is not to say that the verdict was the result of caprice, passion or prejudice, nor that it should be set aside entirely. Hall v. Palmetto Enterprises II, Inc., 282 S.C. 87, 317 S.E.2d 140 (S.C. App. 1984).

Cincinnati alleges that the jury was motivated by improper

argument on the part of OSCO's counsel, but no objection was made at trial. Any right to question its propriety was waived. Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

PUNITIVE DAMAGES

A separate hearing was conducted on the issue of punitive damages. The plaintiff called only one witness, an expert, who testified about Cincinnati's net worth, its reserves, and its earnings. Cincinnati offered no witnesses and asked only one question on cross examination. The entire punitive damages hearing lasted only minutes, though the parties were in no way restricted by the Court. The parties had previously agreed that they would not make closing arguments in this stage of the trial. Again, this was not at the Court's insistence. After deliberations, the jury found that clear and convincing evidence had been shown to justify an award of punitive damages. It awarded $1,630,000.00 in punitive damages, which was roughly twice the actual damage award and 0.003 percent of Cincinnati's net worth.

A post-trial review was conducted under the parameters of Gamble v. Stevenson, ___ S.C. ___, 406 S.E.2d 350 (1992), and findings made on the record. The Court has now considered additional materials which have since been supplied by Cincinnati.

Cincinnati has filed various motions to vacate the award of punitive damages, for a new trial, and for post verdict review of the punitive damages award. I have reviewed these motions in light of the requirements of Gamble and Pacific Mutual Life Insurance Company v. Haslip, ____ U.S. ____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and now reaffirm my previous determination that the award of punitive damages in this instance was proper.

The U.S. Supreme Court and our state Supreme Court have found that punitive damages do not violate the Due Process clause, as long as the system for their imposition is accompanied by sufficient safeguards. South Carolina's commitment to the imposition of punitive damages in appropriate circumstances has

been reaffirmed as a matter of public policy. A review of the evidence shows that the record contains clear and convincing evidence that Cincinnati engaged in a wide variety of misconduct in issuing the policy and adjusting the claim justifying the award of punitive damages in the amount determined by the jury. Without question, there was very clear and very convincing evidence in the record that Cincinnati acted recklessly or in conscious disregard for the rights of OSCO in that it disregarded substantial evidence that OSCO's loss was from water damage, rather than an off-premises power outage; refused to pay, without explanation, even the undisputed portions of OSCO's claims for eight months, despite repeated requests for payment; violated portions of its own claims manual; demanded documentation on a piecemeal basis for months after the loss; took five months to advance the position that the freezer building had only $30,000.00 in contents coverage and did so after one of its adjusters determined that the loss was owed and increased the reserves;

refused to consider OSCO's very viable position on the issue of the incorrect address and Cincinnati's responsibilities, despite having insured OSCO's freezer building at a listed address of 597 High Street for the preceding five years; and, required, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address.

There is substantial clear and convincing evidence that Cincinnati was fully aware of the conduct of its agents, as one of its officers testified that he personally supervised the claim. The punitive award was well within proportions to the original actual award and the amount to which the actual award has now been reduced by the Court. (The award in Haslip was more than 200 times the plaintiff's out of pocket expenses.) The award is easily within Cincinnati's ability to pay, as it only three/one-thousandths of Cincinnati's net worth. The deterrent effect of the punitive award is obvious: it is in an amount which is substantial and designed to get the attention of Cincinnati without being excessive,

and appears to be appropriate to effect the implementation of remedial action. Moreover, Cincinnati has now submitted written argument in support of its motion to vacate which represents that Cincinnati fired its agent, added new policy language, and took other, unspecified remedial steps which would show that the punitive award achieved its purpose.

Cincinnati complains that the Court should not have included in the charge on punitive damages those factors cited in Gamble which appeared to be factually applicable to this case. Those factors, according to Cincinnati, are only for a post-trial evaluation by the Court. While Gamble did list the factors in the context of review of the jury's award by the trial court, there appears to be no logical reason to assert they should not be considered by the jury. The Fourth Circuit Court of Appeals has held that Federal trial courts must submit the Gamble factors to the jury, Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1992), holding that the standards adopted by the South Carolina

Supreme Court in Gamble are intended to be the basis for all awards of punitive damages in South Carolina.

Cincinnati complains that the Court failed to define "clear and convincing evidence." While Cincinnati now submits a number of definitions from other jurisdictions which should have been used, the Court specifically requested charges on this issue and none was provided. In the absence of a specific request or objection, the Defendant cannot complain of the Court's charge Irick v. Ulmer, 246 S.C. 178, 143 S.E.2d 126 (1965).

Cincinnati contends a mistrial should have been declared during the punitive damages phase, and cites several reasons: that the jury had already awarded excessive actual damages and should not have been allowed the consider punitive damages; that Plaintiff was appealing to a "tired" jury; and that Dr. Wood's testimony concerning the Defendant's daily earnings was so prejudicial as to warrant a mistrial. Only the last was raised at trial.

Dr. Wood testified that Cincinnati's daily earnings were

approximately $290,000.00 per day, and that it had therefore earned $2.9 million during the ten days of trial. Such testimony is clearly relevant on the issue of ability of the Defendant to pay an award (see Mattison and Gamble). Further, the Court perceives no prejudice from the daily earnings testimony as the award of punitive damages was far less than $2.9 million.

CONTRIBUTORY NEGLIGENCE

Cincinnati and Bryant contend that the Court erred in several respects regarding the issue of contributory negligence. The major points of contention concern: (1) the refusal to grant a directed verdict because OSCO officials testified that they had not read the 1988 policy; and, (2) the refusal to charge the jury that failure to read a policy of insurance is contributory negligence as a matter of law.

Even if it could be held that OSCO was contributorily negligent as a matter of law in failing to read the insurance policy, the jury affirmatively found, with ample supporting evidence, that

the defendants were willful, wanton and reckless. Contributory negligence is not a defense to reckless and wilful conduct, and the issue of contributorily recklessness was not raised at trial.

It is the burden of the defendant asserting the issue of contributory negligence to prove it and there were many material issues of fact regarding that determination which justified its submission to the jury.

First, Bryant maintained throughout this case that a representative of the agency had driven out to OSCO's plant, delivered the insurance policy, and reviewed the provisions of the insurance policy with OSCO officials. So, Bryant, on the one hand, said that the policy was fully reviewed with OSCO after it was received but, on the other hand, asserted that Bryant is not responsible as a matter of law for any negligence because OSCO did not read the policy. In my view, that is an inconsistency which justifies submission of the issue to the jury to determine what actually took place.

Second, the primary underlying issue in this case was the amount of coverage which the policy provided for frozen food products located in a freezer building across from the office of OSCO. The argument of the defendants is that, if only OSCO had read its policy, it would have seen the error. Thus, OSCO was, as a matter of law, contributorily negligent. I fully understand that our Court of Appeals and Supreme Court have made determinations in cases which reflect a general rule that failure to read one's insurance contract is contributory negligence as a matter of law. [Two of the cases cited by the defendants were King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) and Doub v. Weathersby-Breeland, Ins. Agency, 268 S.C. 319, 233 S.E.2d 111 (1977)]. Aside from the argument advanced by plaintiff that those cases were based on theories of fraud, those cases, in my view, are clearly distinguishable factually from this case.

Here, there was clearly an ambiguity in the contract concerning the applicability of the Dealers Comprehensive Form.

The agent, Bryant, wrote Cincinnati and received word that this form was a part of the policy. That form can easily be read to provide coverage for the inventory of OSCO at any location which is within the control of OSCO.

Also, there is clearly an ambiguity as to the coverage for the contents of the freezer building. The evidence is overwhelming that from 1983 to 1988, Cincinnati and Bryant insured the frozen food located in the freezer building for at least $200,000.00 at an address listed as 597 High Street. In fact, for most of the period, this was the only property which OSCO wanted insured. The evidence is equally overwhelming that the policy in effect on the date of the loss was a renewal, with no request for additions or deletions of coverage by OSCO at that time. On the date of the loss, there was $230,000.00 of coverage for contents located at 597 High Street. The only evidence is that the erroneous address of 488 High Street, and the assigning of an additional $30,000.00 of contents coverage for a building at that

erroneous address, was caused by the defendants. It is absolutely preposterous under these circumstances, to assert so vehemently that the defendants are entitled to a finding, as a matter of law, that OSCO would have known that there was only $30,000.00 on the freezer building's contents if only the policy had been read. That, simply, is not supported by the evidence and I cannot believe that our case law requires such a determination.

In this case, as in others which are relied upon by the defendants, expert testimony was presented on the ability of lay people to understand insurance contracts. As has been previously indicated, even the agent, after reading the policy, did not clearly understand that the Dealer's Comprehensive Form was included. If included, it may be read to cover inventory regardless of location. The erroneous address is shown only on one of two declarations pages, which is located on about the ninth page of the policy. There is no explanation as to the significance of the numbering system used by the insurance company which drafted

the policy. And, again, the same insurance company had insured the same product at the same address shown on the declarations pages for the preceding five years.

To be a valid defense, contributory negligence must be a proximate cause of the plaintiff's injury. That certainly was not established to a degree to justify removing the issue of contributory negligence from the jury by directed verdict. Further, in light of the conflicting evidence regarding Bryant's claim that the policy was explained to OSCO; the finding of recklessness on the part of the defendants, with no assertion in the trial that OSCO was contributorily reckless; and the issues of ambiguity in the policy itself, the Court is convinced that the appropriate way to proceed on the issue of contributory negligence was to submit the issue to the jury, with instructions that it may determine that the failure to read the policy was contributory negligence. Our Supreme Court and Court of Appeals have consistently held contributory negligence is generally a jury question. "Even where the

undisputed facts tend to show both the parties guilty of negligence, questions of negligence, proximate cause, and contributory negligence should be submitted to the jury if there is a fair difference of opinion as to whose act or acts produced or contributed to the injury complained of as a direct and proximate cause." Republic Textile Equipment v. Aetna Ins., 293 S.C. 381, 360 S.E.2d 540 (S.C. App. 1987).

AGENCY

Cincinnati argues that the Court erred in ruling as a matter of law that Bryant was the agent of Cincinnati, alleging "numerous facts" in the record, without citing any.

In reality, there was no real dispute about the issue of agency. Bryant testified to it and introduced his agency contract into evidence with no objection from Cincinnati. The only evidence on the issue from Cincinnati came from its vice president, Mike Gagnon, who testified that Bryant was an "independent agent," meaning he was free to sell other lines of

insurance. That does not mean, however, that he was not Cincinnati's agent. Bryant filled out and transmitted OSCO's applications, collected the premiums, sent the premiums, was paid a commission by Cincinnati, and acted as Cincinnati's representative in communicating with OSCO. Under Section 38-43-10, S.C. Code Ann. (1976) and general principles of agency, there is no other reasonable conclusion but that Bryant was Cincinnati's agent for the purposes of this action.

ELECTION OF REMEDIES

There are really two issues with regard to election. The Defendants' original written motion to elect sought to require election between the legal remedies sought by OSCO (breach of contract, negligence, bad faith) and the equitable remedy sought (reformation). Then, during the trial, Defendants made oral motions to require, as the Court interpreted them, election between tort and contract.

Election between legal and equitable remedies was

discussed in Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (S.C. App. 1986). Referring to the SCRCP, the Court held that a plaintiff may join in the alternative as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent.

Cincinnati argues that the jury was exposed to contradictory evidence, but the ultimate ruling on the reformation claim was reserved for the Court. The jury was never told of the existence of such a claim nor did the claim's existence result in introduction of evidence that would not have been introduced on the legal claims.

As for Cincinnati's argument that election between tort and contract was required, Nichols v. State Farm, 279 S.C. 336, 306 S.E.2d 616 (1983) established the procedure that the trial judge present both causes of action to the jury and strike the damage portion after election.

SUFFICIENCY OF EVIDENCE

Considering the evidence in the light most favorable to OSCO, the Court finds no merit to Cincinnati's argument that the evidence presented does not support the verdicts of the jury and that the verdict is contrary to the greater weight of the evidence. Based upon the recitation of evidence previously stated, the evidence clearly warranted sending the case to the jury on all causes of action and the jury's determination.

ALLEGED IMPROPER ARGUMENT OF COUNSEL

Cincinnati argues in various ways that the trial was tainted by improper argument of counsel. While the Court recalls no impropriety which would taint the trial, no objection was made to counsel's argument and any right to question its propriety is therefore waived. Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

BAD FAITH

Cincinnati argues that it cannot be held liable for bad faith

because: (1) it had reasonable grounds to deny OSCO's claim; and, (2) if the contract was ambiguous, its interpretation was per se reasonable.

For reasons previously stated under the discussion regarding contributory negligence, there was clearly evidence that the policy was ambiguous and that the erroneous address was the fault of the defendants. The contract listed $230,000 of contents coverage at 597 High Street, the uncontradicted address of OSCO's business and the address which had previously been used to insure the contents of the freezer building. Cincinnati, when it investigated the address issue, confirmed that there was no such address as 488 High Street and that OSCO had never used any address other than 597 High Street. At that point, the evidence may clearly be interpreted to warrant a determination that Cincinnati had no reasonable grounds to continue to insist that the freezer building alone was in fact 488 High Street. Nonetheless, that is the position it steadfastly took.

Further, there is strong evidence that Cincinnati acted unreasonably and in conscious disregard for the rights of OSCO in adjusting the claim, including not only the positions it took, but the delays and methods used. There is abundant evidence that Cincinnati knew early on that it owed the claim, that it changed its position regarding reasons for denying the claim, that it unreasonably delayed payment of undisputed parts of the claim, and that its own investigation disclosed no valid reason for denying the claim. In other words, there is abundant evidence of bad faith.

Cincinnati argues that, if the policy is ambiguous, it cannot be guilty of bad faith, because denying liability under an ambiguous policy is, by definition, reasonable. It appears to the Court that the opposite is true. The insurance company, having drawn the contract and collected premiums for $260,000.00 in contents coverage, is obliged to interpret the contract so as to authorize paying the claim, not denying it, where there is a reasonable assertion of coverage. Hann v. Carolina Casualty Ins.

Co., 252 S.C. 518, 167 S.E.2d 420 (1969).

WAIVER AND ESTOPPEL

Cincinnati's brief lumps together the different legal concepts of waiver and estoppel, though it appears to argue waiver. A waiver is an intentional relinquishment of a known right. Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282, 285 (S.C. App. 1987). Estoppel is a principle which prevents one whose actions or words are relied upon by another from changing his position to the detriment of that other person. Russell v. Drivers Leasing, 282 S.C. 358, 318 S.E.2d 579 (S.C. App. 1984).

Cincinnati does not argue estoppel in its brief. There is no issue of estoppel.

Cincinnati does argue that OSCO, by failing to read the policy, waived its right to recover under the policy. Since waiver is an intentional act, it defies logic to believe that a party would continue to pay insurance premiums for $260,000.00 in contents coverage, while intending to give up its right to recover under the

policy in case of a loss. There was no waiver.

SEQUESTRATION AND WITNESSES

MR. CARRIG: Cincinnati complains that Mr. Carrig was allowed to testify in violation of this court's own sequestration order. This is not correct. The Court did impose a sequestration order. At the conclusion of Mr. Carrig's testimony, the Court was asked if it was necessary to continue the sequestration of witnesses who had already testified. The Court determined that it was not, despite the fact that reply testimony might be elicited. No order was violated.

The real question is whether there was error in allowing Mr. Carrig to stay in the courtroom after he had testified, and then be recalled to the stand in reply. Sequestration of witnesses is a matter which is within the discretion of the trial judge. While the procedure used might not have been the best in hindsight, it was applied to both sides evenly and the Court perceives no prejudice to the rights of the defendant. The fact that the plaintiff presents

witnesses first in a trial might have created an advantage in the event that reply testimony was necessary. That would be the case in any trial, because certain procedural advantages and disadvantages are present in all situations. The chief officer of Cincinnati (Mr. Gagnon) and the only witness of Bryant (Mr. Bryant) were present throughout the trial. This is a case in which the parties had the benefit of extensive discovery, depositions, and preparation. In addition, the Court is aware that the parties were having various transcripts of the testimony prepared by the Court Reporter during the trial of the case. It is inconceivable to me that the sequestration process used contributed in any material way to the outcome of the trial. Even though Cincinnati avers that the nonsequestration of Mr. Carrig "clearly prejudiced" the defendants, it offers no example of such prejudice and I am aware of none.

MR. BEACH: Cincinnati further complains about the testimony of Ladson Beach being allowed, in part because he was

not sequestered. Cincinnati also contends Beach was not named as a potential witness in a timely fashion and that Beach's testimony violated Rule 3.7 of the Rules of Professional conduct.

Mr. Beach was one of OSCO's attorneys, the one who was hired by OSCO initially when problems arose in its claim. He clearly played an integral and well-known part in the process which gave rise to this lawsuit.

The issues concerning Mr. Beach's possible testimony were raised at the outset of the trial and the Court reviewed the matters overnight. I determined that Mr. Beach was entitled to be present as he was OSCO's attorney. I determined that the ethics rules prohibited an attorney-witness from continuing as an "advocate" in the trial. The Court and opposing counsel were told at the outset that Mr. Beach might be called, but only in rebuttal, for the purpose of contradicting words and actions attributed to him by an agent of the defendant. He was listed as a potential witness by the plaintiff the week before trial and his deposition was begun,

though not completed.

When issue regarding Beach's testimony arose, Cincinnati was offered the opportunity to request a continuance. Counsel declined to do so. The SCRCP do not establish a cutoff for naming of witnesses. I find nothing improper in allowing this witness to testify in reply. McGaha v. Mosley, 283 S.C. 268, 322 S.E.2d 461 (S.C. App. 1984).

Under Rule 3.7 of the Rules of Professional Conduct, even if Beach acted as an advocate during the trial, subsection (3) allows testimony where "[d]isqualification of the lawyer would work a substantial hardship on the client." Here, disqualification would have deprived OSCO of the only available witness to rebut the adjuster's testimony. That would be a substantial hardship to OSCO. Beach's testimony was properly admitted and there was no surprise to the defendants.

MR. POOSER: Pooser was employed by one of OSCO's former suppliers. His testimony related to the volume of OSCO's

business and its cash flow problems after losing its inventory. Although Pooser himself was not named as a witness, another employee of the same business was named. Pooser appeared at trial because the other employee could not attend. Pooser had knowledge of the same matters as the other employee, and the potential testimony described in answers to interrogatories for the other employee was identical to the testimony given by Pooser. No attempt was made to depose the other employee. Cincinnati suffered no prejudice because Pooser testified instead of his co-worker.

EXPERT TESTIMONY REGARDING READING OF POLICIES: Mike Barranco, one of plaintiff's expert witnesses, commented briefly that most insureds do not read their insurance policies. Cincinnati now contends that this testimony was unduly prejudicial and "contradicted the clear law of South Carolina." In the context in which it was given, the Court perceives no prejudice from this remark, and its admission was not an abuse of discretion. It was

proper testimony from an expert witness in this case. [See Shields v. DHPT, 303 S.C. 439, 401 S.E.2d 185 (S.C. App. 1991)]

MR. HENDRICKSON: Cincinnati charges error in allowing questioning of defense witness Charles Hendrickson about documents he had never seen before. I am unable to determine any specific assertion of error and, quite frankly, do not know why it would be improper to ask a witness about a document on cross examination. If the witness did not know about it, I assume that is the response he or she would give.

Error is also alleged in allowing Hendrickson to be asked whether he would put more credence in a written document prepared in 1983, or a person's memory of what happened in 1983. Cincinnati complains that the question required their witness to weigh the evidence, and is thus improper. The question, however, was put to the witness in a context of claims adjusting on cross examination and was a proper question.

THE 1983 POLICY

Cincinnati alleges error in allowing questioning about a 1983 policy, which it contends was irrelevant to the issues. Testimony regarding the 1983 policy was elicited without objection, by all parties.

The Court perceives no prejudicial error. On the contrary, the 1983 policy was the genesis of the controversy. Evidence was presented that negligence in the handling of the original policy was carried over into the renewal policy. The circumstances surrounding the making of the 1983 policy were relevant, among other things, to the coverage OSCO asked for, what it was entitled to believe, and the interpretation of the 1988 policy.

COMMUNITY ACTIVITIES

Cincinnati contends that it was prejudiced by admission of evidence of OSCO's community activities. OSCO, like any other party is allowed to present some testimony which "personalizes" it. The defendant, for example, presented testimony designed to

portray its adjusters as selfless volunteers, working long hours far from home. The testimony presented concerning OSCO's community activities was so minimal and cursory that no possible prejudice could have resulted.

JURY CHARGES

Cincinnati argues that the Court erred in failing to give numerous jury charges it requested. The record will reflect that the requested charges were cumulative to other charges given by the Court. The specific issues addressed by the defendant's motion are construction of the contract, bad faith, and contributory negligence. Each of these issues was covered fully in the charge as given. Since negligence was the recovery elected by the plaintiff, the primary issue would appear to be contributory negligence, which was discussed in detail above.

BIAS OR PREJUDICE OF THE TRIAL JUDGE

For several years, I umpired baseball games. There was rarely a problem with a player, just from coaches or parents who

should have known better. Despite hundreds of "good" calls, when a call was "bad," someone would accuse an umpire of cheating. These were preposterous assertions, for no umpire had anything to gain or lose. And never was there a call that was quite as critical to the outcome of a game as some tried to make it. In many ways, such criticism was expected as part of the territory and rather comical: a clear assumption of risk.

There is nothing comical about a claim of prejudice on the part of a trial judge. What a sad comment it is upon the legal profession and the bench if such damning attacks on a judge's integrity can spew forth with no more basis in fact than that which is acceptable to bleacher bums.

It is one thing to say that the umpire was wrong, or that he has the eyesight of a winged bat or the intellect of a wooden one. It is quite another thing to seriously accuse the umpire of cheating.

What we have in this case is not a challenge to my ability to see the evidence or to interpret the law. This is not an assertion

that I made an error. Errors were made, though I honestly do not think they affected the outcome. This is a claim that I was prejudiced against litigants and refused to apply the "clear law" because of that prejudice. This is an assertion of judicial impropriety in violation of Canon 3 of the Code of Judicial Conduct.

Despite counsel's apparent position now that this prejudice was demonstrated throughout the trial, the issue was never raised during it. There was never a motion to recuse. The reason, to me, is obvious. The allegation is totally untrue.

While there is a reference to my refusal to allow a continuing objection during the punitive damage phase of the trial (in which you could probably count the total number of questions on one hand), the gist of the "basis" for this claim of prejudice seems to be my refusal to rule with the defendants on the unbending rule that the failure to read one's insurance policy is contributory negligence as a matter of law. Every case cited by

counsel is distinguishable and I have set forth my reasoning in more detail in the discussion of contributory negligence, including contributory recklessness, above.

Counsel includes a quote which they cite as a demonstration of my obvious bias. That comment clearly arose, outside the presence of the jury, in the context of evaluating the testimony of two expert witnesses regarding understanding insurance policies. It was my duty to determine if there was a jury issue, necessitating that I review the evidence. I was merely saying what many Courts, in South Carolina and other states, have recognized: insurance contracts are sometimes difficult for people to understand. Evidence is evaluated in light of common experiences. Dealing with insurance coverage is, without doubt, a fairly universal experience.

This one-sentence quote referred to a situation where my insurance agent and I disagreed over the meaning of the language in my policy. It did not involve Cincinnati. The matter was

resolved in my favor without substantial difficulty. There was no claim involved. It cost me nothing. In short, it was no big deal, and it is absolutely ridiculous to assert that this so obviously demonstrates prejudice on my part. In fact, I kept that same policy and agent for a number of years thereafter, made a claim under it, and was promptly and professionally paid.

I have not had any difficulties which would cause me to have any prejudice towards the insurance industry, nor Cincinnati Insurance Company. To the best of my recollection, I have never had any dealings with Cincinnati.

This is not a case where someone told an insurance agent, "I want full coverage," never read the policy, then sued when the policy did not cover a situation which was clearly excluded in the policy. In this case, the loss was claimed for inventory which was the ONLY thing the insured wanted covered during the first three years, and the primary thing thereafter. For all the reasons previously stated, it appears to the Court that the policy is

obviously ambiguous and that it is very reasonable to read it in the manner advanced by the plaintiffs. It would be totally inequitable to rule, as a matter of law, that the defendants, which created this error, should now be allowed to define its meaning in such restrictive terms as to deny coverage to the plaintiffs as a matter of law. If that is the "clear law" in South Carolina, then its application in this case creates a result which is clearly wrong. This situation is different and I applied the law as I understand it to be, and the only bias or prejudice I had in doing so was that against injustice.

CONCLUSION

The motion for new trial nisi remittitur as to actual damages is granted, and defendant Cincinnati only shall be entitled to a new trial unless plaintiff consents to a reduction in the actual damages judgment to the sum of $595,216.00.

All other motions are denied.

AND IT IS SO ORDERED.

WILLIAM P. KEESLEY

Presiding Judge

Edgefield, South Carolina

May 26, 1992